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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

in the Matter of:

Walter L. Harding,

Petitioner,

V. REPORT OF THE HEARING EXAMINER

City of St. Paul,

Respondent.

The above-entitled matter came on for hearing before State Hearing Examiner Richard C. Lois at 9:00 a.m. on Friday, December 16, l983, in Room 203 of the Veterans Service Building, St. Paul, Minnesota.

Pierre N. Regjnier, Esq. , Jardine, Logan and O'Brien, 1350 Northern Federal Building, St. Paul, Minnesota 55102, appeared on behalf of the Petitioner, Walter l.. Hardirig (also known as the "Employee" or the "veeteran") . Phillip Byrne, Esq. , Assistant St. Paul City Attorney, 647 City St. Paul, Minnesota 55l02, appeared on behalf of the Respondent, the City of St. Paul (also known as the "Cityw or the 'Employer'). Fo11owing the completion of the hearing, the record remainded open through January 13, 1984, for the filing of briefs and reply, memoranda. The Respondent's brief and reply were prepared and submitted by Terry Sullivan, Esq., Assistant St. Paul City Attorney, - whose office address is the same as Mr. Byrne's.

Notice is hereby given that, pursuant to Minn. Stat. sec. 14.61 (1982) the final decision of the Commissioner of Veterans Affairs sh all not be made until this Report has been -made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely

affected to file exceptions and present argument to the Commissioner. excep-
tions to this Report, if any, shall be filed with the -william J. Gregg, com-
missioner, Department of 'Veterans Affairs, veterans Service building, St.
Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this matter is whether the Petitioner's re-
quest for the discharge hearing provided to qualifying veterans under Minn.
Stat. 197.46 (1982) was a timely request within the meaning of that statute,

Based upon all of the proceedings herein, the Hearing Examiner Takes the following:

FINDINGS OF FACT

1. Walter L. Harding, born July 1, 1942, is an honorably discharged veteran of the United States Navy. He joined the Navy on February 8, 1962 and served as a boatswain's mate for two tours of combat duty eduring the Viet Nam conflict aboard the U.S. S. Topeka, and. was discharged at the pay grade of E-4 on June 10, 1966.

2. Mr. Hardin-, was employed by the City of St. Paul from August 27, 1973 to June 11, 1979. His first position was as a building custodian. While so employed, the Petitioner applied and was accepted for training as a City fire-fighter. He was emplooyed as a firefighter from approxmately November 1974 to June 11, 1979.

3. On June 11, 1979, the Petitioner was removed from his employemnt as a firefighters after refusing the Employer's request that he resign in lieu of a discharge. (Ai June 13, 1979, the City's Fire Chief, Steve Conroy, issued a letter to Mr. Harding, designed to confirm the above-noted arrangement.

Chief Conroy's letter, which was actually drafted by Assistant City At-torney Terry Sullivan, advised Mr. Harding that he was Thereby terminated from (his) position in the fire department of the City of St. Paul.". the letter states reasons for discharge (alleged acts of intercourse and fellatio with his daughter, T.H., born October 10, 1965) and ties the alleged facts into certain causes for discharge enumerated at 'Section 32" of the City's Per-sonnel Rules. the second to the last paragraph of the letter advises Mr. Yarding of his right to a hearing and directs him to contact the City's Per-sonnel Department within five (5) days of the letter in order to preserve his right to that hearing.

4. As of June 13, 1979, the Petitioner had notified the City of the fact

that he was a veteran on at least two occasions. tne first occasion was in 1974, a fact acknowledged by the City in awarding him veterans preference points in connection with his application for work as a firefighter (Pet. ex. 6.). ?he second known occasion was on June 7, 1979, at a meeting between the Petitioner, his union representatives, Attorney Sullivan and certain Fire De-part7ent executives testimony of Harding, Assistant chief Heinen and Pet. Ex. 7.).

5. the letter summrized at Finding #3 above is inconsistent with Minn. Stat. 197.46 (the Minnesota Veterans Preference act) and incorrectly cites the City's Personnel Rules. The statute requiires that a qualifying veteran be notified of the employer's 'intent to discharge', while the June 13 letter simply discharged Mr. Harding. Tie statute requires that a veteran be notified of his right to request a discharge hearing within 60 days of his receipt of the notice of the City's intent, whereas the letter to the Petitioner only gave him five days to make that decision. Finally, Section 32 of the city's Personnel Rules had, on June 2, 1979, been superseded by a newly-adopted Section 16. One of the citations in the letter of June 13,

1979, that to 'Section 32 B. (6) ", cites the Petitioner to a section that never existed. However, the other rules cited in the letter remained unchanged in any material respect, except for granmatical changes and renumbering.

6. On June 14, 1979, the Petitioner, through !,,is then-attorney, David Stewart, wrote to -Bernard Wright, the Assistant Director of Personnel for the City, and requested the Civil Service hearing mentioned in Chief Conroy's letter. Stewart also wrote that "You should be aware that there is also a criminal action pending so the Civil Service Commission hearing must be held after the completion of the criminal charges.' this is a reference to Mr. Harding's having been charged with at least two felony counts of criminal sexual conduct, and it was that alleged conduct for which the City had term-nated his employment.

'7. On June 18, 1979, Bernard Wright wrote to both David Stewart and to the Petitioner, informing them that the City would comply with the Peti-tioner's request to continue the matter of the discharge hearing ". . . until the criminal procedures have been completed.' (jurisdictional Ex. 1-C.).

Wright's June 18 letter informed Harding that '. . . the Civil Service Rules provide that if such a request is made by an employee who has received a discharge, the employee will be suspended without pay during that period of time between the request for continuance and the date of the continued hearing itself.'. A space was provided at the bottom of the letter for the Petitioner to acknowledge, by his signature, the above-quoted condition. Mr. Harding signed the acknowledgment on June 26, 1979.

8. As a result of the employee's recest for a continuance, the City's granting of that continuance, and the Employee's waiver of any right to pay after June 26, 1979, until after completion of the criminal proceedings, the loyee's Civil Service hearing was postponed indefinitely.

9. (Ai February, 27, 1980, Attorney David Stewart notified the City that

Mr. Harding, whose trial was pending on felony charges of Criminal sexual con-
buict, would thereafter be represented by Attorney Douglas Thomson.

10. Sometime before March 20, 1980, the fact that Mr. Harding had been
convicted of criminal sexual conduct came to the attention of Assistant City
Attorney Sullivan. On March 20, Sullivan wrote to Attorney Tomson that it
,,;as his (Sullivan's) understanding that "the criminal actions concerning Mr.
Harding have been completed and, therefore, the Co ission would like to set a
date for hearing". Sullivan's letter goes on to state, "The personne! Rules
require that a request for a hearing be made within five (5) days, therefore,
I am forwarding this letter to you to serve as notice to Mr. Harding that he
must now make his request for such hearing.'. Sullivan's letter adds:

> "Since I am not totally aware of all of the fact.--,, it may be that the criminal action has not yet -been completed. If this is the case, please advise this office and we will contact you when the criminal action is completed. in such case, of course, the continuance would remain in effect.'.

11. on March 22, 1980, Attorney Thomson wrote to Sullivan and requested a Civil Service hearing for It. Harding. He also announced the Petitioner's intention to appeal his conviction to the Minnesota Supreme Court and stated that 'it 'would be our position that the criminal act,'.-on against Mr. Harding would not be completed until at least the time the Minnesota Court rendered its decision on his appeal and, therefore, that the continuance of his hearing before the Civil Service Commission in regard to his discharge would remain in effect.'.

12. Sullivan replied in writing to thomson March 22 letter on April 1, l980. He was uncertain at that point as to Whether Harding wanted his hearing expedited or postponed. Sullivan closed the letter as follows:

> "Would you please advise me as to which acticn, you, desire. If you wish the present continuance to remiin, that is agreeable to us and, of course, Mr. Harding would maintence his right to a hearing after the procedure is co,-n-pleted. Da the other hand, if you wish a hearing at this time, I will take immediate steps to set up such a hearing.
>
> Please advise which alternative you desire.'.

13. Thomson responded in writing to Sullivan's April I letter on April 11, 1980, stating that he had been informed by his law clerk, Barbara Gislason, that the City and Thomson's office had an agreement to continue the (civil Service hearing 'until the completion of (Harding's) appeal.'.

During the interim between April 1 and April 11, 1980, Sullivan had had a telephone conversation with Thomson's then-law clerk, Barbara Gislason. Gislason agreed that TThomson's office would notify, Sullivan about Harding's intentions regarding his Civil Service hearing within five days of the Supreme (court's decision on the Harding case. with the exception of Slllivan's note to his file regarding this conversation, the agree,-,tent was never reduced to writing. The City was never notified of Harding's inten ions until June 24, 1983 (See Finding No. 15 below).

14. (On March 27, 1981, the Minnesota Court upheld Harding's conviction of the felony of criminal sexual conduct in the first degree. He remained incarcerated at Stillwater prison where he had been sentenced on March 28, 1980, through February 28, 1983. sometime after his sentencing, Harding dismissed Douglas Thomson as his attorney and retained Attorney James Noonan for purposes of his Supreme Court appeal. Noonan had to resign from the case due to ill health, and Attorney Russell Jensen represented Harding before the Supreme Court. Subsequently, the Petitioner was represented by Attorney Patrick Sweeney, who later moved to Florida, and Harding went without legal representation until contacting his present counsel at Jardine, Logan and O'Brien in the spring of 1983.

Mr. Harding has never been personally advised of any time limit during which he had to notify the City of his request for a hearing, apart from the

notice in the original discharge document of June 13, 1979 to the effect that he had five days to request a hearing.

15. On June 24, 1983, the Petitioner, through his Attorney Pierre Regnier, made a formal written request for a Civil Service Hearing. The City rejected this request as untimely on July 14, 1983, and Harding petitioned for relief to tne Commissioner of Veterans Affairs.

16. The Petitioner has not been paid by the City for any time after June 11, 1979. His salary as of that date was $694.28 every two weeks. This figure .,as later adjusted, pursuant to contract, to a level of $742.88 every two weeks.

Based upon the above Findings of Fact, the Hearing Examiner makes the fcl-!owing:

CONCLUSIONS

1. That any of the foregoing Findings of Fact which are more appropri-ately designated legal Conclusions are hereby adopted as such.

2. That the Commissioner Of Veterans Affairs and the Hearing Examiner have Jurisdiction in this matter pursuant to &Ann. Stat. SS 197.481 and 14.50.

3. That the Notice of and Order for Hearing were proper and the Minnesota Department of Veterans Affairs has fulfilled all relevant substantive and pro-cedural requirements of law and rule.

4. That the Petitioner, Walter l. Harding, is a veteran within the meaning of Minn. Stat. 5 197.46, the Minnesota Veterans Preference Act.

5. That the Petitioner, Walter L. Harding, has the burden of proving by a preponderance of the evidence that he is entitled to a hearing under the Min-nesota Veterans Preference Act; he has not met that burden.

6. That die Petitioner established his right to a hearing by requestirig that hearing on June 14, 1979, one day after the issuancE Of the Employer's discharge letter.

7. That the Petitioner waived his right to the hearing he requested on June 14, 1979, by not notifying the City that he intended to proceed to a Civil Service hearing within a reasonable time after March 27, 1981, the date his crimi.nal conviction was upheld by the Minnesota Supreme Court.

8. That the Petitioner is entitled to back pay for the period of June 12 through June 26, 1979, the date on which he waived his right to further compensaticn in exchange for a continuance of his discharge hearing.

Based upon the foregoing Conclusions, the Hearing examiner makes the following:

IT IS recommended that the Commissioer of Veterans Affairs issue an order denying the Petitioner's request for a discharge hearing.

IT IS Futher Recommended that the Commissioner of Veterans Affairs issue an order requiring the Respondent, City of St. Paul, to award back pay, with interest in accordance with "Minn. Stat. sec. 549.09, to the Petitioner for the period from June 12 through June 26, 1979.

Dated this day of February, 1984.

RICHARD C. LUIS
Hearing Examiner

Reported: Taped.

MEMORANDUM

Although the June 13, 1979 notice of discharge, with further notification to it" Harding that he could have a hearing if he announcEd his intention to contest the discharge within five days, was inconsistent in several respects with the notice requirements of Minn. Stat. sec. 197.46, it is the Hearing Examiner's opinion that the Petitioner waived any possible objection to not being notified that he had 60 days in which to request a hearing. This waiver occurred because the Petitioner actually did request the hearing within on(--, day, on June 14, 1979. The other 'deficiencies' in the notice, when compared to the requirements of ,-the Veterans Preference Act, were in calling the letter a notice of 'termination", rather than a notice of "intent to discharge", and in citing violations of -Personnel Rules which had been renumbered. these are matters of semtics and technical detail which do not, in and of themselves, make the notice inadequate. taken as a whole, the notice is 'sufficiently detailed and adequate in substance', in accord with State, ex rel. Jenson v. Civil Service Commission of City of Minneapolis, 130 N.W.2d 143, 1 Minn. 1964), to satisfy the Minnesota Veterans Preference Act, except for the fact

that it fails to give the employee 60 days to decide on AThether he wants a hearing.

The employer's allowance of five days after notice of discharge to request a hearing on that discharge is only wrong in this instance because Mr. Harding is a veteran. It is consistent, however, with Section 16 C. of the City's Personnel Rules. while it is true that the Veterans Preference Act supersedes any inconsistent municipal regulations, that principle would only apply here if (1) Mr. Harding had waited more than five days, but less than 60 days, to request the hearing, and (2) the City attempted to interpose the defense that

"Harding's initial request for a hearing was Neither of those conditions occurred. Mr. Harding established his right to a hearing one day after the City formalized his term ination from thus creating a situtation in compliance with both the veterans Preference Act and the City's Personnel Rules.

Mr. Harding's request for a hearing was accompanied by the further request that the time of the hearing be postponed until resolution of the criminal proceedings that had been initiated against him .. At all times, the City has complied with the Employee's regust in this regard. the city's position has been consistent throughout in desiring notification to it of whether the Employee wanted to proceed within five days of the resolution of the criminal proceedings. This position was maintained by Assistant City Attorney Sullivan through his course of dealings on the subject with both David Stewart and Douglas Thomson, the only attorneys for Harding known to :Sullivan before the Minnesota Supreme Court appeal was resolved.

Counsel for ft. Harding ;agreed with the five day notiice requirement as well-. A question of fact exists in the record on the point of who agreed to notify whom (as between Sullivan and Tnomson's (Dffice) regarding Harding's intentions after the Supreme Court had issued its decision. The Hearing Examiner has decided this question in favor of the City. First, it is logical that Thomson's office, not Sullivan, should take the responsibility for reopening the discharge case because it is they are in a position to know exactly when the criminal proceedings against Harding had been 'resolved'. Second, the fact that the agreement was not reduced to a writing between the parties does not make it unenforceable. Third, Thomson's law clerk, Barbara Gislason, was Harding's legal agent with the authority to bind Harding in this respect. See, Gibson v. Nelson, 111 Minn. 183, 126 N.W. 731 (1910), which stands for the proposition that the rules of law applicable to principal and

agent control the relationship of attorney and client, and Dunnell's Minnesota Digest, 2d Series, Agency sec. 2.01, f. 30, which contains a long list of cases supporting the general rule of law that an agent has the implied authority to exercise "such powers as are directly connected with and essential to the business expressly entrusted to the agent'. An attorney enjoys broad authority in dealing with the procedural aspects of his client's cause, and "stands in the shoes' of his clients in the conduct of litigation. It is customary for adverse parties to look to the attorney and not- to the attorney's client, and the attorney's authority in such matters ought to be sufficient to allow the other party to do so with safety. See, Bray v. Doheny, 39 Minn. 355, 40 N..W. 262 (1888) and Sprader v. Mueller, 265 Minn. 111, 121 N.W.2d 176 (1963).

it is further noted that nomson's letter to Sullivan of April 11, 1980, acknowledges and accepts the agreement reached between Sullivan and Gislason, Thomson's clerk, regarding postponement of the hearing. Thomson's letter makes no mention, however, of an agreement to contact Sullivan after co,-.- pletion of the Supreme Court appeal. In concluding that such was the agreement, the Hearing Examiner has relied on the testimony of Sullivan, as co,-- roborated by a note to Sullivan's file he made at the time of his telephone conversation with Gislason. The note is inherently reliable as a past recollection recorded because the name "Gislison' is If Sullivan had

manufactured the note to cover himself at some point in ,:i,@e after the con-
versation, it is. reasoned that he would have spelled the clerk's namTT,e co.--
r,E,ctly, Because i@amson's April 11, 1980, letter to him out the -iame
'Gislascn'.

41. Harding has many of the equities of this case in his favor. In
addition to the fact that the City failed to treat him like a veteran with
respect to the initial notice of a right to a hearing, he has testified, and
the Hearing Examiner believes, that no.one ever told him that he had to apply
within any time lim it whatsoever in order to preserve his right to a hearing,
with the exception of the first written notice that he had five days to dis-
close his choice to have one. However, the Petitioner agreed, through his
attorneys, to postpone the hearing until after the criminal case against him
had been resolved. The last agreement on this was made in April, 1980, to the
effect that Harding had to get back to the City within five days of the
decision in the supreme Court appeal. This deadline passed in early April of
1981. Harding did not notify the City of his desire to contest his discharge
from employment at a Civil Service Hearing for over two years after the
agreed-to deadline. The Hearing Examiner is not persuaded that the veteran
should be excused for this delay, to the detriment of the City, because his
attorneys (whoever they may have been at any given point in times, may have
failed either in telling him, or in telling their successors, of the agreement
with Mr. Sullivan. The City had the right to rely on time representation by
Thomsdon office that Sullivan would be notified of Harding's intentions
within five days of the Supreme Court's decision. The fact that Earning had a
different attorney by the tine the decision was issued does not change the
binding agreement made by Thomson's office on Harding's behalf. Harding's
remedy under such circumstances does not lie in an action against the City.

The Hearing Examiner would be more favorably disposed toD Mr. Harding if he

had requested his hearing within a, reasonable time after the Supreme Court appeal was decided. Five days is an extremely short period of time for announcing such a decision, especially since it is reasonable to conclude that the news of the decision against him was a trauma for the Petitioner. The Veterans Preference Act gives. a qualifying veteran 60 days to decide on whether he wants a hearing. This is liberal, remedial, legislation designed to protect a certain class of people who have made a sacrifice for their state and country by serving in the armed forces during time of war. Mr. Harding could that he complied with the spirit of the Act if he had asked for the hearing within 60 days of the Supreme Court's decision and the Hearing Examiner may have been persuaded to recomend relief. However , two years is too long.

St. Paul City Personnel Rule 16.B.2. reads:

'The following shall be cause for an employee's - Discharge, reduction or suspension from his or her position:

2. Commission of an immoral or a criminal act ; but if such act is, at the of the charge being considered, involved in a criminal proceeding before a grand jury or the courts, the employee so charged by request that the investigation be postponed or continued until such time as

> the criminal proceedings are terminated, and such rests shall be granted; provides the employee shall be suspended from duty and provided he/she shall execute a -waiver of all right to pay during said postponement; and provided further that the employee may have the hearing or investigation proceed at any time on 10 days notice in writing; I

The Veteran argues that the final clause of the above-quoted 'rule allows him to Fake his June 24, 1983, request for a hearing a timely one under the Veterans ?reference Act. The Hearing Examiner cannot agree. the only reasonable interpretation of the clause is that its purpose is to allow any person who has had his hearing process postponed, pending resolution of the related criminal prosecution, a means to reopen the hearing process before the criminal matter is completed. The lo-day notice provision only applies during the time the criminal proceeding remains pending. To interpret this clause as allowing an employee whose hearing was postponed for commpletion of a criminal matter the right to reopen his hearing at any time, upon 10 days' notice, leads to the absurd result of allowing a diischarge hearing to be held 5, 10, 20 or more years after the separation from employment.

The case of Kurtz v. City of Apple Valley, 290 N.W.2d 171 (Minn. 1980), is relied upon by Harding for supporting his argument that the notice and hearing provisions of the Veterans Preference Act were requred to be compline with once again after disposition of the criminal charges against him. The argument is that the Petitioner should have been given a new notice with another 60-day period in -which to decide whether he wanted a discharge hearing after 27, 1981. The Petitioner's brief cites the Supreme Court's footncte at 290 N.W.2d 174 in support of this argument. The footnote reads:

> 1. El, noting that the city reserved the right to discharge the veteran even if acquitted, we do not mean to indicate that a suspension without pay pending the resolution of the criminal charges would have been permissible but for such a reservation; the result would be the same. Nor do we imply that the City would not have been required, in response to statutory notice under the Veterans Preference Act, to grant a hearing after disposition of the criminal charges regardless of the outcome; it would be.

:he Hearing Examiner cannot agree with the Employee's interpretation of the above-quoted footnote. The City of St. Paul recognized that, in response to tne "statutory notice' it had received (from Harding) that the employee wanted a discharge hearing, it was required to do just w ,at the Court had in mind -- grant a hearing to him after disposition of the criminal charges. The "statutory notice" mentioned by the Court is notice from the employee within 60 days of separation from work that he wanted a discharge hearing, not a re- quirerment that the Employer republish a Notice of Hearing and allow another 60-day period for reply.

The petitioner relies herin on the argument that the city has failed to prove the T:@@o re--,iire,,Tie,,its of the affir7z,:i,je equitable defense of laclics.

-@e elements of laches are (1) an irexcusa'--Ie dela,,, or lack of diligence in

asserting any right or claim, and (y that the @elay has caused un(j,-,e p:-(--iu-

d4ce tG the party against whom the claim is assertie@. See, ?@,A C.i.S.,

@Ijity, 5S 115, 116. Both parties devoted consi2e:atle briefing effort to

arguing whether or not these elements ha,] t@F@r. satisfied. -@, e Hea,,in@ F,'xar.--

iner does not belie@7e it is necessary to !7es@,D2%,e t.,ie q,2c-,stion of whether the

(--ity has proven the ele.,@,-its cl lache,,;. He beli@@,,es that this is si7@iply a

c3l,@le claim, c,,-ie ',,ias retained un,-,sse.-@e,3 for a long time, contrary to

the agreement of the parties. After riot having hea,.d from the vetp-fan for

over three years, and for over two years after7 it @@as agreed tnat 'the co.,,n-
munication would occur, thc- City was correct in
that the ---quest for

,a had 'Dc-en --!Dandon@,. rio constitute @- s3
tale claim,
the only

fact -.,s the passing of an unreasonably lcng period of time. Another point of

6istination from lac4es is that, to co.,!.st-'-t,:@e !aches, @a change in con@ition

r,@.ust have occi-lr,,ed vinich would render it inequitable @,:o enforce the claim,

-@hile no such change need have occurred t-D render the c5e:narid stal@-. S,-.e, 30-k

C.J.S. Eq,,iity, Section 112.

T'ne Hearing Exa-,,-iiner is mindful of the fact that a reviewing authority

could disagree with '@is interpretation of the iE7s;i)e and that the City !,-,@st have proven the elements of laches. :f is t.-@e case, the reviewer

consider that the delay was, in fact, inexcusable herein became the

veteran was bound by his attorney's agree7ent to notify the City of his

intentions within five days of the Supreme Court's decision. l@o excuse, other

than ignorance of the agreement, has been offered for the Petitioner's having

,@aited over two years. For reasons outlined at@ve, the Fearing --/aminer does

not believe that excuse is sufficient. in addition, it is apparent that Mr.

Harding was not diligent in pursuing his clat" qhe very length of time in-

volved in waiting to pirsue it sop-aks for itself. It is reasonable to pres@

that, had he really cared about the status of his job, the Petitioner would

have contacted the City, or his attorneys, within a short time after he lost

his Supreme Court apteal. As to the elpi-,ient of Prejudicial delay, it should

be considered that the City's pri@ry wiz:nesses are possibly and

that the transcript preferred in lieu of tneir appearance has less impact than

teSti7Ony delivered in person. The witnesses are Tia,,c3ing's two daughters,

r)or-i n 1965 and 1969, who now live in Saic-,-,, Oregon. In addition, IL-le ,.qit-r,,esses 7,ay not remember the (,vents @icri th-@y .4ill be asked to recall, V.-hich

events eeac',,-i back in title some five to eig:it years, Finally, they may be un-

willing to testify a second time, four years after they delivered their testi-

T,-,.cny in a criminal trial, to events w.'.riich are likely to be painful, er--bar-

rassing, humiliating and traumatic in their re<-- c)llection. Tne City is, in-
Cieed, prz-1ii(iiced ty the passage of ti,@- if it :.s ordered to hold a discharge

-aripg on this case in I'@84. It is the Heari-ig Examiner'@s opinion that the
elements of !aches have been proven.

There remains the matter of back pay. -Ln the YLirtz case, at 290 N.W.2f3

1'/3, @te &iprrne Court -evi@.7s three earlier Mi-inesota casf?s interpreting the

Minnesota Veterans Prefereace Act anS concludes, among other things, that
p
. . . a suspension without pay pending discharge proceedings is

illegal . . . . an its surface, this conclusion seems to render the appli-

cation of the above-quoted Section 16B.2 of the @--ity@s ,--ivil @,@r-;ice P,,,.,Ies illegal when applied against qualifying ;eterans. it is the '@earipg r--xam-i.-ier-'s opinion that the CoLrt's oicttlm, only appli@-s to suspensions without To,, against public employees whc are veterans. in t'@,iis case, F4arding agleed on June 26, 1979, to a @,-,spension of e-ititle,@nt to IDay in return for the Cit@'Is a!,-ic-,,qi-ig hii,,. to extc-,-i,,3 t.r)e ,-,i,7@- of the hearing 'or an indefinite length of time (u,-itil resolution of the criminal charges).

ir- is clear that that agreement constitutes a legally enforceable waive.- of his right to any further pay uneer the '@eteL-ans Preference Act, as that @,--t was interpreted in the above-noted State, ex rel. Jenson v. Civil Service Com-mission of Minneapolis case. The Minnesota Supreme Court has held thato-"Fxcept as @i@i @ by public policy, a person may -waive an,@ legal right, con-stitutional or statutory.". See, Martin v. Wolfson, 16 N.W.2d 884, 890 (1944). (Given the Petitioner's waiver of any-er-iti!-.!-eT-@ent to pay after iine ,@6, 1-979, an,,l given the fact that there is no public -@licy limitation on the ri@ht of a person t,-) forego ;ages em order to get an extension of time Wanted ,-of t@e cc@nc7,,,ict of a hearing, it has @en re7o..@..enJed that t@-. H-arding be a-,,;afdo,3 back pay only until t:r@e tiipe of his waiver.

@,e issue of @,,,ether or not Mr. Ha-rrling could gc-li his job Dack by at a hearing on tne merits of his tiiL-@-harge h@is not b@en c@,,-isiCered by the i@ Ex@.iner in @his :ase because he believes of th t qjestion is immaterial to a matter before the Cozmis.,;ior,.er of @.7c-terans Affairs, who can decide, with reapecl to such a hearing, only whether -)r not it s@all take place.

R.C.L.